Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

STATE STREET BANK & TRUST COMPANY,

Cross-Petitioner,

v.

JERRY R. SUMMERS, *et al.*,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

The settlement agreement between Petitioners and the settling co-fiduciaries contains a bar order that extinguishes State Street Bank & Trust's ("State Street") right to seek contribution and indemnity from the settling co-fiduciaries. Such a bar order requires a fairness hearing to evaluate the equities of the bar order. Because the Seventh Circuit Court of Appeals affirmed the district court's decision granting State Street's motion for summary judgment, the Seventh Circuit dismissed State Street's cross-appeal as academic and did not rule on whether the bar order and the district court's failure to conduct an evidentiary hearing on its fairness was unfair to State Street. Should the Supreme Court accept review, State Street requests that this Court also review the following question:

Did the district court abuse its discretion when it approved a settlement agreement containing a bar order that deprives a non-settling fiduciary of its right to contribution and indemnity under ERISA from a settling co-fiduciary without conducting an evidentiary fairness hearing?

LISTED PARTIES AND RULE 29.6 DISCLOSURE STATEMENT

In addition to the parties identified in the caption, the following were parties in the consolidated appeal proceedings before the Seventh Circuit Court of Appeals and are cross-respondents before this Court: George T. Lenormand, Jeffrey D. Crites, Louise Van Rensburg, James E. Shambo, UAL Corporation ESOP Committee, Marty Torres, Barry Wilson, Doug Walsh, Ira Levy, Don Clements, and Craig Musa.

Cross-Petitioner State Street Bank & Trust Company ("State Street") is a wholly-owned subsidiary of State Street Corporation, a bank holding company with no other business.

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OPINIONS AND JUDGMENTS BELOW

Cross-Petitioner, State Street Bank & Trust Company ("State Street"), conditionally cross-petitions for a writ of certiorari to review that portion of the opinion and judgment of the Seventh Circuit dismissing State Street's appeal of the district court's approval of a settlement agreement containing a bar order, and the judgment of the United States District Court for the Northern District of Illinois approving a settlement agreement containing a bar order.

The opinion of the Seventh Circuit is reported at 453 F.3d 404 (7th Cir. 2006). It is also included in the appendix filed by Petitioners, Summers, *et al.* in Docket No. 06-439. (Pet. App. 1a-19a). The district court's order disposing of the issue that is the subject of this cross-petition is not reported. (Cross-Pet. App. 1a).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 28, 2006. Summers's petition for a writ of certiorari was placed on this Court's docket on September 27, 2006, Docket No. 06-439. This conditional cross-petition is timely under Supreme Court Rule 12.5. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Nature Of The Action

Petitioners, participants in the United Airlines Corporation Employee Stock Ownership Plan (the "UAL Corporation ESOP" or the "Plan"), filed this class action on February 28, 2003, against the Plan, the UAL Corporation ESOP Committee (the "Committee"), and the individual members of the Committee, Marty Torres, Barry Wilson, Doug Walsh, Ira Levy, Don Clements, and Craig Musa (the "Settling Defendants" and, together with Petitioners, the "Settling Parties").[1] The district court had original jurisdiction because Petitioners asserted a federal question claim arising under the Employee Retirement Income Security Act of 1974 ("ERISA"). *See* 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331.

The Committee and its members were the Plan's named fiduciaries responsible for establishing the Plan's investment policy.[2] Petitioners alleged the Committee and its members breached their fiduciary duty to the Petitioners by failing to

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1. *See* Item No. 1 of the Record as contained in the District Court's Docket (hereinafter referred to as "R.Doc." followed by the docket number, and brief description of item): R.Doc.1, Complaint.

2. *See* R.Doc.130, Appendix of Exhibits Submitted to the District Court in Support of State Street's Statement of Undisputed Material Facts, (hereinafter referred to as "App. Ex.") Exhibit No. 2, Ex. B (Plan at p. 42, ¶ 11.1); *see also* State Street's Appendix Submitted to the Seventh Circuit Court of Appeal (hereinafter referred to as "SA") pp. 140-141(Trust Agreement at pp. 1-2)); R.Doc.178, Plaintiffs' Statement of Additional Facts ("Plfs' Add'l Facts"), at ¶ 2.

diversify the ets of the Plan soon after they knew, or should have known nited Airlines Corporation ("UAL") was suffering financially and its bankruptcy was "imminent." They alleged the Committee and its members should have known UAL's bankruptcy was "imminent" by October 17, 2001, when UAL CEO Jim Goodwin sent a letter (the "Goodwin Letter") to all UAL employees painting a dire picture of UAL's financial condition and rallying the employees to commit to improving the company's financial viability.[3]

Petitioners added State Street as a defendant on July 28, 2004, almost a year and a half after they initiated the lawsuit.[4] State Street was the "directed trustee" for the Plan.[5] If an ERISA plan "provides that the trustee or trustees are subject to the direction of a named fiduciary [the Committee] who is not a trustee, . . . the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to [ERISA]." 29 U.S.C. § 1103(a)(1). The Plan required investing exclusively in UAL stock. Accordingly, as a directed trustee, State Street was required to invest the Plan's assets "exclusively" in UAL stock[6] and follow the directions of the Committee as long as those directions were not in conflict with the terms of the Plan or ERISA.[7]

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3. R.Doc.1, Complaint.

4. R.Doc.42, Second Amended Complaint.

5. SA 138-165, Trust Agreement; R.Doc.130, SUF at ¶ 2.

6. SA 144-45, Trust Agreement at §3.3.

7. SA 149, Trust Agreement at §3.6.3.

Petitioners alleged State Street breached its fiduciary duty as a directed trustee by failing to override the terms of the Plan and diversify the Plan's investments following the issuance of the Goodwin Letter.[8] Petitioners further alleged State Street breached its duty of loyalty because it knew the Committee was comprised of UAL employees and members of the UAL employee unions and were thus "inherently" or "potentially" conflicted by virtue of this dual status. State Street's alleged liability is therefore derivative of the Committee's liability. State Street could only be liable if the Committee and its members were ultimately found liable for breaching their duty of prudence and/or loyalty.

B. The Settlement Agreement

On July 18, 2005, Petitioners and the Settling Defendants finalized the terms of the Settlement Agreement.[9] The Settlement Agreement contains a bar order provision (the "Bar Order") precluding State Street (the only non-settling defendant in this action) from bringing any claims of contribution or equitable indemnity against the Settling Defendants in the event a final judgment is ultimately rendered against State Street.[10]

The Settlement Agreement also includes a "Judgment Reduction" clause providing that any judgment against State Street would be "set off" (or reduced) by the greater amount of either: (i) the *pro tanto* approach, which is the $5.25

8. R.Doc.42, Second Amended Complaint at ¶ 128.

9. R.Doc.205, Joint Motion To Stay Pending Approval of Settlement.

10. R.Doc.210, Pls' Memo ISO Prelim. Approval of Settlement, Ex. A, Settlement Agreement at p. 11, ¶ 2.4 *et seq.*

million settlement amount between Petitioners and Settling Defendants ("Settlement Credit"); or (ii) a modified proportionate fault approach, which is the value of any contribution or equitable indemnification claim which the district court determines State Street would otherwise have been able to assert against the Settling Defendants capped according to the Settling Defendants' ability to pay ("Contribution Credit").[11] In moving for preliminary approval of the Settlement Agreement, Petitioners and the Settling Defendants argued a financial cap was necessary because the Settling Defendants had very limited financial resources.[12]

On September 30, 2005, State Street timely objected to the Settlement Agreement on the basis it unfairly deprived it of its right to contribution and indemnity from the Settling Defendants.[13] In particular, the Bar Order ignored Settling Defendants' other sources of contribution, including rights to indemnification from the Air Line Pilots Association ("ALPA") potentially worth millions of dollars. On October 12, 2005 (the same day he granted summary judgment in favor of State Street), the Honorable Samuel Der-Yeghiyan in the United States District Court, Northern District of Illinois, approved the Settlement Agreement and overruled State Street's objection to it without explanation.[14]

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11. *Id.*, Settlement Agreement at p.5, ¶ 1.20 (ii) and pp. 11-12, ¶¶ 2.4.2-2.4.3.

12. R.Doc.210, Pls' Memo ISO Prelim. Approval of Settlement at p. 1.

13. R.Doc.260-262, State Street's Objection to Partial Settlement.

14. R.Doc.278, Minute Entry and Cross-Pet. App. 1a.

C. Petitioners' Appeal To The Seventh Circuit

Petitioners appealed the district court's order granting summary judgment in favor of State Street to the Seventh Circuit Court of Appeals. State Street cross-appealed the district court's order overruling State Street's objection to the Settlement Agreement. On June 28, 2006, the Seventh Circuit affirmed the district court's order granting summary judgment to State Street. The Seventh Circuit's opinion and judgment dismissed State Street's cross-appeal, reasoning that since it was affirming the summary judgment order in State Street's favor, it did not need to resolve the question regarding the Settlement Agreement and Bar Order. *Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 413 (7th Cir. 2006).

In its opinion, the Seventh Circuit highlighted the potential unfairness of the Bar Order underscoring that the premise of the Bar Order incorrectly assumes the Settling Defendants lack any assets to pay a judgment for contribution:

> The judge in approving the settlement entered an order in effect barring State Street from seeking anything from the Committee members beyond what personal assets they may have. The judge gave no reason for this action; if we may judge from the arguments of the parties' lawyers, either he thought this result "fair" or, as argued by the plaintiffs' lawyer, thought it would make no difference because State Street could in no event obtain from the Committee members money they don't have. But if this is what the judge thought, he was wrong. The members' unions have agreed to indemnify them.

Summers v. State Street Bank & Trust Co., 453 F.3d at 412-13.

REASONS FOR GRANTING WRIT

The Seventh Circuit did not rule on the Bar Order issue, noting: "Since we are affirming the dismissal of the plaintiffs' claim against State Street, there is no imperative need to discuss the cross-appeal; it is academic unless this court sitting *en banc*, or the Supreme Court, reverses our decision in favor of State Street." *Summers v. State Street Bank & Trust Co.*, 453 F.3d at 412. If this Court ultimately grants the petition for review and reverses the judgment in favor of State Street, State Street's cross-appeal would no longer be academic, and fairness would dictate that the issues raised in State Street's underlying cross-appeal pertaining to the Bar Order first be remanded to the Seventh Circuit for review prior to any remand to the district court.

CONCLUSION

For the foregoing reasons, State Street respectfully submits that if this Court grants the petition for a writ of certiorari in Docket No. 06-439, it should also grant this conditional cross-petition to fully address the issues presented in this case.

Respectfully submitted,

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APPENDIX

APPENDIX — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED OCTOBER 12, 2005

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge:
Samuel Der-Yeghiayan

Case Number: *003 C 1537*

Date: *10/12/2005*

Case Title: *Summers v. UAL*

Docket Entry Text:

Fairness hearing held. As stated on the record, plaintiffs' motion for final approval of partial settlement is granted. The Court approves the partial settlement between plaintiffs and settling defendants. The plaintiffs are given until 10/28/05 to send out notice to the class regarding attorneys' fees. Fairness hearing as to attorneys' fees is set for 11/22/05 at 11:00 a.m.

(2)

No. 06-602

IN THE

Supreme Court of the United States

STATE STREET BANK & TRUST COMPANY,

Cross-Petitioner,

v.

JERRY SUMMERS, GEORGE T. LENORMAND, JEFFERY D. CRITES, LOUISE VAN RENSBURG and JAMES E. SHAMBO, individually and on behalf of all others similarly situated,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Because the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision granting State Street Bank & Trust's ("State Street's") motion for summary judgment, the Seventh Circuit dismissed State Street's contingent cross-appeal challenging the settlement between Plaintiff/Petitioners and State Street's co-fiduciaries, the UAL Corporation ESOP Committee members ("Settling Defendants"). State Street claimed that the bar order in the settlement agreement is improper because it extinguishes State Street's hypothetical right to bring a contribution action against the Settling Defendants in the event of a judgment against State Street. In dismissing State Street's appeal, the Seventh Circuit noted that, even if this Court were to reverse the judgment in favor of State Street such that State Street were subject to a judgment in this action, State Street would have no possible challenge to the bar order *unless* there is a right of contribution amongst co-fiduciaries under the Employee Retirement Security Act of 1974 ("ERISA"); as to that question, the Seventh Circuit noted, the Courts of Appeal are split. Accordingly, in the event that this Court reverses the judgment against State Street, Plaintiffs submit that it should also decide the following question:

Is their a right of contribution amongst breaching fiduciaries under ERISA?

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the following are parties to the case (and are all defendants/cross-respondents who have previously settled all claims against them): UAL Corporation ESOP Committee, Marty Torres, Barry Wilson, Doug Walsh, Ira Levy, Don Clements, and Craig Musa.

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STATEMENT OF THE CASE

A. Nature of the Action

This case is a class action brought on behalf of thousands of individuals who were participants in the United Airlines Corporation Employee Stock Ownership Plan ("United ESOP" or "the Plan") during the period from November 17, 2001, through June 30, 2003.[1] In this case, Cross-Respondents/ Plaintiffs allege that the fiduciaries of the United ESOP, including State Street Bank & Trust Company ("State Street"), breached their fiduciary duties to the Plan and its participants by failing to diversify the Plan's investment in the stock of United Airlines ("United," or "UAL") even though State Street knew that United faced extreme financial problems and a significant risk of bankruptcy. Despite unmistakably clear and unusually candid warnings from United's CEO on October 17, 2001, and repeated warnings about the company's viability over the next 10 months, the Plan's fiduciaries took no action to diversify the Plan's investments. Even after State Street concluded that there was a "high risk" that UAL would not qualify for the government loan guarantees that the Company needed to survive, State Street continued to do nothing to protect the Plan and its participants from UAL's plunge into bankruptcy that essentially wiped out the Plan's assets.[2]

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1. R.Doc.# 178, Plfs' Add'l Facts, ¶ 1, and Exs. A-E (Class Representative Declarations) attached thereto, Appellants' App., Tab B.

2. A fuller Statement of the Case appears in Plaintiffs' Petition for Writ of Certiorari.

Without authority, State Street asserts that its "alleged liability is therefore derivative of the Committee's liability." Cross-Petition at 4. In fact, as a fiduciary under ERISA, State Street' liability is not "derivative," but is joint and several. *See, e.g., Donovan v. Robbins*, 752 F.2d 1170, 1185 (7th Cir. 1985) (quoting S. Rep. No. 93-127, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4882 ("According to the Senate Report, 'any fiduciary who breaches his trust is personally liable for losses resulting from such breach, and *co-fiduciaries are jointly and severally liable. . . .*'" (emphasis added by Seventh Circuit)).

B. The Settlement Agreement

Plaintiffs entered into the Settlement Agreement with the ESOP Committee Members (the "Settling Defendants"). Plaintiffs agreed to settle with the Settling Defendants within the limits of available insurance proceeds because, as the Bankruptcy Court presiding over the UAL bankruptcy found, the Settling Defendants (who were union-member employees of UAL) "are parties without significant assets."[3]

Plaintiffs became aware that the Administrative Manual of the Airline Pilots Association ("ALPA") provides that the union may, in its discretion, indemnify ALPA members who serve as fiduciaries of ERISA plans – including two of the Settling Defendants.[4] However, Plaintiffs' counsel concluded

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3. R.Doc.# 270, Declaration of Andrew M. Volk in Support of Plaintiffs' Motion for Final Approval of Partial Settlement ("Volk Decl."), ¶ 9, and Ex. H thereto.

4. R.Doc.# 270, Volk Decl., Ex. K; *see also* R. Doc# 271, Declaration of Jalmer Johnson at ¶ 4.

that the ALPA indemnification right was unlikely to be of any value to the settlement Class since (i) the right was "not automatic," but subject to the discretion of ALPA's Executive Council; (ii) ALPA's insurance policies exclude coverage for fiduciaries of stock ownership plans; and (iii) ALPA lacks significant assets that would be available to fund any indemnification remedy in the event that ALPA members sought and obtained such a remedy after a judgment against them.[5]

As a condition of settlement, the Settling Defendants insisted that they be protected from subsequent litigation by non-settling parties. Accordingly, the Settlement Agreement contains a bar order provision ("Bar Order") that prevents State Street from bringing any claims for contribution or indemnification against the Settling Defendants in the event this Court reverses the judgment of the Seventh Circuit and a final judgment is eventually entered against State Street.[6]

The Settlement Agreement leaves State Street in *at least* as good a position as it would have been in the absence of a settlement. That is because the Settlement Agreement also includes a generous "Judgment Reduction" provision that allows State Street to receive *the greater of* (i) a "pro tanto" reduction, which is the $5.25 million settlement amount between Petitioners and Settling Defendants or (ii) a modified proportionate fault reduction based on the value of any contribution or indemnification claim they would have

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5. R.Doc.# 270, Volk Decl. ¶¶ 12-20 and documents cited therein.

6. R.Doc.# 210, Pls' Memo ISO Prelim. Approval of Settlement, Ex. A, Settlement Agreement at p. 11, ¶ 2.4.

otherwise been able to assert against the Settling Defendants *subject to* the ability State Street would have had to collect on such a judgment.[7]

Accordingly, while State Street complains that the Settlement cuts off its ability to obtain a judgment against the Settling Defendants and thereby forced them to seek discretionary indemnification from ALPA, *in fact,* if State Street were able to establish that (i) ERISA allows for contribution actions; (ii) it would be able to prevail in such an action against the Settling Defendants and (iii) that the Settling Defendants could and would have obtained indemnification from ALPA, then any judgment against State Street would be reduced accordingly under the terms of the Bar Order.

The district court overruled State Street's objections to the Bar Order and approved the Settlement Agreement.[8]

C. Cross-Petitioners' Contingent Cross-Appeal To The Seventh Circuit

When Plaintiffs/Petitioners appealed the district court's grant of summary judgment to the Seventh Circuit Court of Appeals, State Street filed a contingent cross-appeal from the district court's approval of the Settlement Agreement. Because the Seventh Circuit affirmed the district court's order granting summary judgment to State Street, it did not resolve State Street's appeal. State Stret's appeal would only become

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7. *Id.* Settlement Agreement at p. 5, ¶ 1.20 and pp. 11-12, ¶¶ 2.4.2-2.4.3.

8. R.Doc.# 278, Minute Entry and Cross-Pet. App. 1a.

ripe in the event that this Court reverses the Seventh Circuit's decision. *Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 413 (7th Cir. 2006).

However, the Seventh Circuit noted, *id.*, State Street would have no possible basis upon which to challenge the Bar Order *unless* there is a right of contribution under ERISA:

> The settlement-bar approach assumes, moreover, that there is a right of contribution, *and it is unsettled whether ERISA defendants have such a right. Lumpkin v. Envirodyne Indus.*, 933 F.2d 449, 464 n.10 (7th Cir. 1991); *compare Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 16-17 (2d Cir. 1991) (yes, contribution), with *Kim v. Fujikawa*, 871 F.2d 1427, 1432-33 (9th Cir. 1989) (no). We assumed in *Alton Mem'l Hosp. v. Metro. Life Ins. Co.*, 656 F.2d 245, 250 (7th Cir. 1981), that they do, but did not actually discuss the question, which remains an open one in this circuit. [Emphasis added.]

Indeed, if there is no right of contribution between ERISA co-fiduciaries, then the Bar Order would have to be approved since it would then indisputably leave State Street in a better position than it would be in the absence of a Bar Order. If there is no right of contribution under ERISA, the $5.25 million Judgment Reduction under the settlement would truly be a gift to State Street in the event that a final judgment is ultimately rendered against State Street in this action.

REASONS FOR GRANTING THE PETITION

Plaintiffs/Cross-Respondents submit that, if this Court reverses the district court's decision granting summary judgment in favor of State Street, then the Court should also reach the question of the propriety of the Bar Order entered by the district court as a condition of Plaintiffs' settlement with State Street's co-fiduciaries, the UAL ESOP Committee members (the "Settling Defendants"). This is the issue raised by State Street in its contingent appeal in the Seventh Circuit, and in its conditional cross-petition here. More specifically, Plaintiffs submit, if this Court reverses the judgment of the district court here such that State Street becomes susceptible to a final judgment, the Court should resolve the split amongst the Courts of Appeal regarding whether or not there is a right of contribution amongst ERISA co-fiduciaries. If there is no right of contribution, then this Court must affirm the district court's entry of the Bar Order. Indeed, if there is no right of contribution under ERISA, State Street can not be heard to claim that the Bar Order "deprived it of its right to contribution. . . ." Cross-Pet. at 4.

A. The Courts of Appeal Are Split On The Question Of Whether There Is A Right Of Contribution Under ERISA

As the Seventh Circuit recognized, the Courts of Appeals are split as to whether there is a right of contribution for co-fiduciaries under ERISA. *See Summers,* 453 F.3d at 404. The Court of Appeals for the Second Circuit squarely holds that there is a right of contribution for ERISA fiduciaries. *Chemung Canal Trust Co. v. Sovran Bank/Maryland,* 939 F.2d 12, 16-17 (2d Cir. 1991). In contrast, the Court of

Appeals for the Ninth Circuit squarely holds that there is no such right. *Kim v. Fujikawa,* 871 F.2d 1427, 1432-1433 (9th Cir. 1989).

As the Ninth Circuit stated in rejecting Fujikawa's contention that contribution actions should be available under ERISA:

> Fujikawa contends that ERISA does not and should not prohibit actions for contribution among fiduciary trustees. He argues that, in enacting ERISA, Congress provided for "broad equitable remedies," including contribution, and that actions for contribution are consistent with the language and purposes of the statute. We disagree. As the Supreme Court noted in *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 141-42 ... (1984), section 409 of ERISA, 29 U.S.C. § 1109, only establishes remedies for the benefit of the *plan.* Therefore, this section cannot be read as providing for an equitable remedy of contribution in favor of a *breaching fiduciary.*

Fujikawa, 871 F.2d at 1432 (emphasis in original). Further, the *Fujikawa* court stated, "the Supreme Court has noted that, in light of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a comprehensive and reticulated statute, it seems clear that Congress did *not* intend to authorize other remedies [under ERISA] that it simply forgot to incorporate expressly." *Fujikawa,* 871 F.2d at 1432 (quoting *Russell,* 473 U.S. at 146 (emphasis provided by *Russell* Court, internal quotation marks omitted).

If anything, this argument has grown even stronger since the time of *Fujikawa* and *Russell,* as this Court has continued to hold that the only remedies available under ERISA are those remedies that are explicitly spelled-out in the statute. *See, e.g., Russell,* 473 U.S. at 144-148 (because statute is silent on subject of punitive damages, punitive damages are unavailable under ERISA); *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 254 (1993) (quoting *Russell*) ("Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.") *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 209 (2002) (same).

Nonetheless, the Second Circuit has never retreated from its holding in *Chemung Canal,* 939 F.2d at 17-18, that there is a right of contribution as a matter of federal common law. Similarly, the Seventh Circuit Court of Appeals has suggested that there may be right of contribution under ERISA. *See Free v. Briody,* 732 F.2d 1331, 1337-38 (7th Cir. 1984); *but see Summers,* 453 F.3d at 413 (noting that the issue is an open question in the Seventh Circuit).

District courts outside of the Second, Seventh and Ninth Circuits also disagree as to whether there is a right of contribution for ERISA fiduciaries. For example, the following district court decisions held there is no right of contribution and/or indemnification amongst ERISA co-fiduciaries: *Toledo Blade Newspaper Unions-Blade Pension Plan v. Investment Performance Servs.*, 2006 U.S. Dist. Lexis 66615 (N.D. Ohio Sept. 18, 2006); *May v. National Bank of Commerce,* No. 03-2112, 2004 WL 1169995, at *2 (W.D. Tenn. Feb. 27, 2004); *Openshaw v. Cohen, Klingenstein & Marks, Inc.*, 320 F. Supp. 2d 357, 364 (D. Md. 2004); *Williams v. Provident Inv. Counsel, Inc.,* 279 F. Supp. 2d

894, 901, 902 n.4 (N.D. Ohio 2003); *Center Physicians, Inc. v. Painwebber Group, Inc.*, 1996 U.S. Dist. Lexis 22657 (E.D. Mo. May 8, 1996).

On the other hand, the following decisions recognized a right of contribution and/or indemnification amongst ERISA co-fiduciaries: *Site-Blauvelt Eng'rs, Inc. v. First Union Corp.*, 153 F. Supp. 2d 707, 709 (E.D. Pa 2001); *Cooper v. Kossan*, 993 F. Supp. 375 (E.D. Va. 1998); *Green v. Willam Masson & Co.*, 976 F. Supp. 298 (D.N.J. 1997); *Duncan v. Santaniello*, 900 F. Supp. 547, 550-51 (D. Mass. 1995); *Maher v. Strachan Shipping Co.*, 817 F. Supp. 43 (E.D. La. 1993); *Jones v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 1992 U.S. Dist. Lexis 14441 (N.D. Ga. 1992). Such a view seems patently inconsistent with this Court's decisions in *Great-West, Mertens*, and *Russell. See also* George Lee Fling, Jr. & Philip N. Moore, Jr., *ERISA: A Co-Fiduciary Has No Right To Contribution and Indemnity*, 48 S.D.L. Rev. 7 (2003).

Should this Court grant Plaintiffs/Cross-Respondent's petition, and should it reverse the grant of summary judgment against State Street, it should resolved the issue of whether there is a right of contribution for ERISA fiduciaries.

B. Setting a Uniform Standard Is Necessary Given the Amount of Pending Litigation Concerning These Issues

As the many cases cited in the prior section illustrate, the issue of whether or not an ERISA defendant has a right of contribution or indemnification has arisen frequently – and there are numerous decisions on each side of the issue.

Plaintiffs/Cross-Respondents believe that a clear answer is compelled by this Court's decisions in *Great West, Mertens* and *Russell.* In any event, the split amongst the Courts of Appeal should be resolved.

C. The "Relief" Sought By State Street In Its Petition Should Not Be Granted

While State Street styles its pleading as a "conditional cross-petition," and seeks a writ of certiorari, it expressly asks this Court *not* to resolve the question it presents concerning the propriety of the Bar Order. Instead, State Street asks that this Court *remand* that issue to the Seventh Circuit Court of Appeals. Cross-Petition at 7.

Plaintiffs respectfully disagree. In the event that this Court grants Plaintiffs' petition for review and reverses the judgment in favor of State Street, this Court should resolve the issue as to whether there is a right of contribution for ERISA defendants. State Street's suggested approach is inefficient, as it would require a remand to the Seventh Circuit to come down on one side or the other of a circuit split that is already ripe for resolution by this Court.

CONCLUSION

In the event that Plaintiffs' petition for writ of certiorari is granted and this Court reverses the district court's grant of summary judgment in favor of State Street, the conditional cross-petition for a writ of certiorari should be granted to resolve the split amongst the circuit courts of appeal as to whether there is a right of contribution for co-fiduciaries under ERISA.

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